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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 756.

ESTHER M. KROMER and EDWARD L. KROMER and STAYON PRODUCTS, INC., an Illinois Corporation,

Petitioners,

v.

RIEGEL TEXTILE CORPORATION, a Delaware Corporation,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

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Statement of the Case.

This action was brought to recover damages and profits for alleged infringement of the Kromer *et al.* patent No. 2,454,463, dated November 23, 1948 for "Baby Safety Sheet" and for alleged unfair competition (copying of petitioners' commercial sheet). Judgment of the Trial Court dismissed the unfair competition count for want of equity but adjudged the patent valid and infringed and ordered an injunction and accounting for damages. Respondent appealed from that portion of the judgment dealing with the patent. Petitioners did not appeal from the dismissal of the complaint for unfair competition. The Court of Appeals for the Seventh Circuit held the single claim of the patent not infringed.

The Court of Appeals based its conclusions on *Dixie Cup Co.* v. *Paper Container Mfg. Co.*, 169 F. 2d 645, 648 (CA 7) and also on *Exhibit Supply Co.* v. *Ace Patents Corp.*, 315 U. S. 126, 136. It held that:

> "In our view it is a clear case for the application of doctrine of file wrapper estoppel, which the District Court did not discuss or refer to."

The Question Presented on the Petition.

Notwithstanding the verbose statement of "questions" set forth in the petition, the only conceivable question could be whether that holding of the Court of Appeals is correct.

There is No Proper Ground for Granting a Petition for Certiorari.

There are no special or important reasons why the petition should be granted. It is a simple case of patent infringement between two private litigants. The Court of Appeals held against the petitioners on the ground of non-infringement and they are dissatisfied.

(a) The holding is in accord with the decisions of this Court, in fact the Court of Appeals relied on and quoted from the law as enunciated by this Court.

(b) There is no conflict between Courts of Appeal. The patent was never passed on in any other case.

(c) There is no important question of Federal Law which has not been settled; the law as to file wrapper estoppel has been settled over and over again by many decisions and there is no disagreement about it.

(d) The Court of Appeals did not depart from the accepted and usual course in this case; it acted strictly in accordance with the usual course.

Petitioners contend that because the Trial Court found infringement it must necessarily have considered the defense of file wrapper estoppel. Aside from the fact that the conclusion is entirely unsound, it is of no consequence because the defense of file wrapper estoppel is a matter of law and not of fact. The only facts having to do with the defense are found in the file wrapper, which is a written instrument and can be interpreted as well by the Court of Appeals as by the District Court. Therefore, even if the District Court had passed on this defense, the Court of Appeals had no choice but to review the matter and come to its own conclusions in regard to the validity of the defense.

Conclusion.

This case presents no conflict of opinion other than the conflict which always exists when an Appellate Court concludes that the Trial Court was mistaken in finding infringement of a patent. The case is invested with no public interest. No important question of law is involved. There has been no departure from established principles of review applicable to patent infringement suits. The petition should be denied.

Respectfully submitted,

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Counsel for Respondent.

Dated: March 16, 1956.